

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAUL KOVASH and U.S. POSTAL SERVICE,  
POST OFFICE, Oakland, CA

*Docket No. 00-363; Submitted on the Record;  
Issued June 26, 2000*

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DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective October 5, 1993 on the grounds that he refused an offer of suitable work.

This case has previously been on appeal before the Board. In a decision dated February 23, 1998, the Board found that the Office abused its discretion in refusing to reopen appellant's claim for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128. The Board remanded the case for consideration of the merits of the claim and a *de novo* decision on the issue of whether appellant had established modification of the Office's termination of his compensation under 5 U.S.C. § 8106(c).<sup>1</sup> The findings of fact and conclusions of law as set forth in the Board's prior decision are incorporated herein by reference.

By decision dated April 23, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of its prior merit decision.

In a letter dated May 19, 1998, appellant, through his representative, requested a hearing before an Office hearing representative. In a decision dated July 29, 1998, the Office denied appellant's request for a hearing on the grounds that it had no jurisdiction to review a decision by the Board. By letter dated August 13, 1998, appellant specified that he wished a hearing on the Office's April 23, 1998 decision. In a decision dated September 14, 1998, a hearing

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<sup>1</sup> *Paul Kovash*, 49 ECAB \_\_\_\_ (Docket No. 96-2354, issued February 23, 1998).

representative affirmed the Office's termination of appellant's compensation based on his refusal of suitable employment.<sup>2</sup>

The Board finds that the Office improperly terminated appellant's compensation effective October 5, 1993 on the grounds that he refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him or her is not entitled to compensation.<sup>3</sup> The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific requirements of the position.<sup>4</sup> To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty position, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.<sup>5</sup>

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.<sup>6</sup> The Board finds that the probative medical evidence is insufficient to establish that the position offered was within appellant's medical restrictions.

The Office based its finding that the position of part-time modified letter carrier offered by the employing establishment was suitable on work restriction evaluations dated April 8 and July 22, 1993 from Dr. Peter M. Szymoniak, a Board-certified orthopedic surgeon and appellant's attending physician.<sup>7</sup> He found that appellant could intermittently sit for 4 hours per day; intermittently walk for 3 hours per day; intermittently lift 10 to 20 pounds for 1 hour per day; and intermittently stand for 2 hours per day. Dr. Szymoniak further found that appellant could not bend, squat, climb, kneel or twist. However, in response to the question of whether appellant could work for eight hours per day, he stated that appellant had "been disabled [five] years with no change in his condition." The Office failed to recognize the internal inconsistency between Dr. Szymoniak's listed limitations and his specific finding that he remained disabled

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<sup>2</sup> The hearing representative specifically affirmed the Office's decisions dated December 27, 1995 and July 18, 1996; however, the Board previously set aside the Office's July 18, 1996 decision.

<sup>3</sup> 5 U.S.C. § 8106(c)(2).

<sup>4</sup> *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

<sup>5</sup> *Glen L. Sinclair*, 36 ECAB 664 (1985).

<sup>6</sup> *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

<sup>7</sup> Following his injury, accepted by the Office for chronic lumbar strain, appellant received treatment from Dr. Eric E. Bugna, a Board-certified orthopedic surgeon, who opined that appellant was totally disabled from employment. In 1992, appellant informed the Office that he was relocating to Alabama, from California and chose Dr. Szymoniak as his attending physician.

from employment. The Office should have resolved the apparent discrepancies in his reports prior to determining the extent of appellant's work restrictions and whether any job offered to him was consistent with those restrictions.<sup>8</sup>

As the medical evidence does not establish that the position offered was suitable, the Office improperly terminated appellant's compensation on the grounds that he refused an offer of suitable work.<sup>9</sup>

The September 14, 1999 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, D.C.  
June 26, 2000

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> See *Robert Bledsoe*, 34 ECAB 144 (1982).

<sup>9</sup> Moreover, in a subsequent report dated February 21, Dr. Szymoniak, opined that appellant "has been disabled for five years. There has been no improvement in his condition. [Appellant] is not able to handle the duties of a letter carrier." In a report dated December 20, 1994, Dr. Szymoniak related that he misinterpreted the OWCP-5 form and that appellant could not stand or walk more than 1 hour per day for around 10 minutes at a time." In a report dated August 14, 1995, he indicated that he had "read the job description offered to [appellant] in September 1993 and I do not feel that he is capable of being on his feet for this long."